No. 22-95

In the

Supreme Court of the United States

SCHUYLER FILE,

Petitioner,

v.

MARGARET HICKEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF THE WISCONSIN SUPREME COURT JUSTICES IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Petitioner identified the question presented as being about the applicable standard of review. The Seventh Circuit's decision did not address the standard of review and instead held that Petitioner's First Amendment claim is foreclosed by *Keller v. State Bar of California*, 496 U.S. 1 (1990). *Keller* remains good law, and there is no circuit conflict or other compelling reason to revisit it. Additionally, this case is a poor vehicle and lacks a developed record.

Is membership in a mandatory state bar association subject to heightened First Amendment scrutiny?

TABLE OF CONTENTS

QUESTION PRESENTED i

INTRODUCTION 1

STATEMENT OF THE CASE............................ 2

I. Background regarding Wisconsin's integrated bar, mandatory membership and dues, and the lawyer-regulation system 2

II. District court proceedings 5

A. Petitioner's challenge to Wisconsin's mandatory bar 5

B. The district court granted Respondents' motions to dismiss that were based upon *Keller*.......... 7

III. The Seventh Circuit affirmed, applying *Keller*... 8

REASONS FOR DENYING THE PETITION... 10

I. There is no circuit conflict or other compelling reason to grant certiorari, which this Court has repeatedly denied in similar cases. 11

II. This Court should not overrule *Keller*, which remains good law after *Janus*. 12

III. This case is a poor vehicle to revisit *Keller*. 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 9, 15

Boudreaux v. La. State Bar Ass'n,
3 F.4th 748 (5th Cir. 2021)............................. 11, 12

Crowe v. Or. State Bar,
142 S. Ct. 79 (2021) 12

Crowe v. Or. State Bar,
989 F.3d 714 (9th Cir. 2021) 11, 12

Firth v. McDonald,
142 S. Ct. 1442 (2022) 12

Gruber v. Or. State Bar,
142 S. Ct. 78 (2021) 12

Harris v. Quinn,
573 U.S. 616 (2014) 16, 17

In re Disciplinary Proceedings Against Amoun Vang Sayaovong,
871 N.W.2d 271 (Wis. 2015)................................... 5

In re Disciplinary Proceedings Against FitzGerald,
735 N.W.2d 913 (Wis. 2007)................................... 5

Janus v. AFSCME, Council 31,
138 S. Ct. 2448 (2018) ....1, *passim*

Jarchow v. State Bar of Wis.,
140 S. Ct. 1720 (2020) 10, 12

Jarchow v. State Bar of Wis.,
No. 19-3444, 2019 WL 8953257
(7th Cir. Dec. 23, 2019).................................... 9, 11

Keller v. State Bar of Cal.,
496 U.S. 1 (1990) ....8, *passim*

Lathrop v. Donohue,
367 U.S. 820 (1961) 14

McDonald v. Firth,
142 S. Ct. 1442 (2022) 12

McDonald v. Longley,
4 F.4th 229 (5th Cir. 2021)............................ 11, 12

Schell v. Darby,
142 S. Ct. 1440 (2022) 12

Schell v. The Chief Justice & Justices of the Okla. Sup. Ct.,
11 F.4th 1178 (10th Cir 2021)....................... 11, 12

Taylor v. Buchanan,
4 F.4th 406 (6th Cir. 2021).................................. 11

Taylor v. Heath,
142 S. Ct. 1441 (2022) 12

Other Authorities

Wisconsin Supreme Court Rule 10.01(1) 2

Wisconsin Supreme Court Rule 10.02(1) 2

Wisconsin Supreme Court Rule 10.03(1) 2

Wisconsin Supreme Court Rule 10.02(2) 2

Wisconsin Supreme Court Rule 10.03(5) 3

Wisconsin Supreme Court Rule 10.03(5)(b)1. 3

Wisconsin Supreme Court Rule 10.03(5)(b)2. 3

Wisconsin Supreme Court Rule 10.03(5)(b)3. 3

Wisconsin Supreme Court Rule 10.03(5)(b)4. 3

Wisconsin Supreme Court Rule 10.03(5)(b)5. 3

Wisconsin Supreme Court Rule 10.03(6) 3

Wisconsin Supreme Court Rule 20:8.4(f). 5

Wisconsin Supreme Court Rule 21............................ 4

Wisconsin Supreme Court Rule 21.01....................... 4

Wisconsin Supreme Court Rule 21.02(1) 4

Wisconsin Supreme Court Rule 21.02(2) 4

Wisconsin Supreme Court Rule 22.11(1). 4

INTRODUCTION

Petitioner Schuyler File sued State Bar of Wisconsin officials and the Justices of the Wisconsin Supreme Court to challenge Wisconsin's system of mandatory bar dues and membership in a state bar for attorneys. His First Amendment claim is squarely foreclosed by *Keller*; therefore, this case is about whether this Court should revisit or overrule *Keller*. There are insufficient reasons to grant certiorari, and there are three convincing reasons to deny it.

First, there is no circuit conflict or other compelling reason to take this case. As similar cases have shown, the lower courts agree that *Keller* controls and forecloses First Amendment claims like Petitioner's. This Court has not taken any of them up, and it should again decline to do so.

Second, *Keller* remains good law. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018), did not undermine *Keller* or even address it. This Court's justifications for mandatory bar associations in *Keller* remain correct.

Third, this case is a poor vehicle to revisit *Keller*. The case was resolved on motions to dismiss. The Seventh Circuit simply applied *Keller*, nothing more. If this Court wants to take up *Keller*'s validity, it would be better served by doing so with a fulsome trial-court record and after further percolation in the lower courts.

STATEMENT OF THE CASE

Wisconsin has a mandatory bar association for attorneys. The association aids the state's courts in the administration of justice, maintains high ideals of integrity and standards of conduct in the practice of law, offers continuing legal education, and improves the quality of legal services available to Wisconsinites. Petitioner challenged the requirement that an attorney must be a member of the State Bar of Wisconsin and pay dues to practice law.

I. Background regarding Wisconsin's integrated bar, mandatory membership and dues, and the lawyer-regulation system

Membership in the State Bar of Wisconsin is a "condition precedent to the right to practice law in Wisconsin." Wisconsin Supreme Court Rule 10.01(1) (*hereinafter* "SCR ___," found at Pet. App. 39–119). All persons licensed to practice law in Wisconsin are organized as an association: the "state bar of Wisconsin." SCR 10.02(1); *see also* SCR 10.03(1).

The purposes of the association include: to aid the courts in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence, and public service and high standards of conduct; to conduct a program of continuing legal education; and to promote the innovation, development, and improvement of means to deliver legal services to the people of Wisconsin. SCR 10.02(2).

State Bar members must pay annual membership dues. SCR 10.03(5). "The State Bar may engage in and fund any activity that is reasonably intended for the purposes of the association set forth in SCR 10.02(2)." SCR 10.03(5)(b)1. "The State Bar may not use the compulsory dues of any member who objects . . . for activities that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services." *Id.* "Expenditures that are not necessarily or reasonably related to the purposes of regulating the legal profession or improving the quality of legal services may be funded only with voluntary dues, user fees or other sources of revenue." *Id.*

Yearly, the State Bar must publish written notice of the activities that can be supported by compulsory dues and those that cannot. SCR 10.03(5)(b)2. The notice must be sent to every Bar member with an annual dues statement. *Id.* A member may withhold the pro rata portion of dues budgeted for activities that cannot be supported by compulsory dues. *Id.* A member may challenge the Bar's calculation of these amounts by arbitration. SCR 10.03(5)(b)3., 4., 5.

A member who does not pay annual dues may have his membership suspended in the manner specified in the State Bar's bylaws. SCR 10.03(6). No person whose membership is suspended for nonpayment of dues may practice law during the period of suspension. *Id.*

SCR 21 establishes the lawyer regulation system "to carry out the [state] supreme court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin." SCR 21 Preamble. The system is made up of the Office of Lawyer Regulation (OLR), district committees, a preliminary review committee, referees, a board of administrative oversight, and the state supreme court. SCR 21.01.

The OLR "receives and responds to inquiries and grievances relating to attorneys licensed to practice law or practicing law in Wisconsin and, when appropriate, investigates allegations of attorney misconduct or medical incapacity." SCR 21.02(1). "The office is responsible for the prosecution of disciplinary proceedings alleging attorney misconduct and proceedings alleging attorney medical incapacity and the investigation of license reinstatement petitions." *Id.* "The office has discretion whether to investigate and to prosecute de minimus violations." *Id.* "Discretion permits the office to prioritize resources on matters where there is harm and to complete them more promptly." *Id.*

The OLR functions pursuant to the procedures in SCR 22. SCR 21.02(2). The director of the OLR initiates "a proceeding alleging [attorney] misconduct by filing a complaint and an order to answer with the supreme court and serving a copy of each on the" attorney. SCR 22.11(1).

It is professional misconduct for a Wisconsin lawyer to violate a supreme court rule. SCR 20:8.4(f). The OLR has pursued disciplinary proceedings in the Wisconsin Supreme Court involving violations of SCR 10.03(6) when members failed to pay their dues, were suspended, and continued to practice law. *See In re Disciplinary Proceedings Against Amoun Vang Sayaovong*, 871 N.W.2d 271 (Wis. 2015); *In re Disciplinary Proceedings Against FitzGerald*, 735 N.W.2d 913 (Wis. 2007).

II. District court proceedings

A. Petitioner's challenge to Wisconsin's mandatory bar

Petitioner alleged that Respondents are violating his First Amendment rights to free speech and association by "continuing to mandate his [State Bar] membership and charge him dues." (Pet. App. 36.) In his complaint, he alleged that the Justices "have adopted a requirement of mandatory membership [in the State Bar] and dues for all attorneys licensed in Wisconsin." (Pet. App. 36 ¶ 24.) These rules are found in SCRs 10.01(1), 10.03(1), 10.03(4)(a), and 10.03(5)(a). (Pet. App. 32 ¶¶ 11–12.) Petitioner alleged that if he practices law in Wisconsin and fails to maintain State Bar membership and pay dues, "he could be sent to jail for a year and fined $500 or both for engaging in the unauthorized practice of law. Wis. Stat. § 757.30." (Pet. App. 32 ¶ 13.)

He alleged that the association of the State Bar "forces [Petitioner] to be associated with and support

speech with which he may not agree." (Pet. App. 36 ¶ 26.) Respondents' actions allegedly constitute a violation of Petitioner's rights "to not join or subsidize an organization without his affirmative consent." (Pet. App. 37 ¶ 28.)

Petitioner alleged that the State Bar "does not serve as a formal regulatory system for legal ethics in Wisconsin." (Pet. App. 33 ¶ 15.) Instead, he alleged the Board of Bar Examiners, OLR, Judicial Education Committee, and Judicial Commission serve various legal-ethics regulatory functions. (Pet. App. 33 ¶ 15.)

His core complaint is that the State Bar's lobbying and other public-facing activities violate his First Amendment free speech and association rights. (Pet. App. 33–35.) He alleged that the State Bar spent over $520,000 lobbying the Wisconsin State Legislature and that the State Bar engages in legislative advocacy activities with Congress and through the American Bar Association. (Pet. App. 33–34 ¶ 17.) The State Bar allegedly also "engages in a wide variety of ideologically charged activities that fall outside the formal confines of 'lobbying.'" (Pet. App. 34 ¶ 18.)

Petitioner highlighted activities the State Bar allegedly engaged in: (1) naming as a 2018 "Legal Innovator" the founder of TransLaw Help Wisconsin, who also co-authored a book published by the State Bar in 2018 titled *Sexual Orientation, Gender Identity, and the Law* (Pet. App. 34 ¶ 19); and (2) including as a speaker at its 2018 annual meeting

Richard Painter, a vocal critic of former-President Donald Trump "who served in the White House of [former-President] George W. Bush but became a Democrat and was at the time of his speech a Democratic candidate for U.S. Senate." (Pet. App. 34 ¶ 20.) These examples allegedly "illustrate the simple reality that virtually everything the State Bar does takes a position on the law and matters of public concern." (Pet. App. 35 ¶ 21.)

Petitioner requested declaratory and injunctive relief against Respondents. He requested: (1) a declaration that the SCRs requiring him to belong to the State Bar of Wisconsin are unconstitutional; (2) an order enjoining the Justices from "enforcing their rules requiring State Bar membership through the attorney disciplinary process"; (3) an order enjoining the State Bar from enforcing the mandatory membership rule or charging mandatory dues to him; (4) attorney fees and costs; and (5) any further relief to which he is entitled. (Pet. App. 37–38.)

B. The district court granted Respondents' motions to dismiss that were based upon *Keller*.

Petitioner filed his complaint on July 25, 2019. (Pet. App. 38.) Respondents moved to dismiss and relied upon *Keller*. (Pet. App. 14, 22–28.)

On June 29, 2020, the district court entered a decision and order granting Respondents' dismissal motions. (Pet. App. 14–28.) The court reasoned that although this Court's decision in "*Janus* might in

some respects support the argument that mandatory bar membership is unconstitutional, the Court did not in any way suggest that it was overruling *Keller*." (Pet. App. 26.) The court "conclude[d] that [Petitioner]'s claim is foreclosed by *Keller*, which only the Supreme Court may overrule." (Pet. App. 28.) Petitioner appealed. (Pet. App. 1–2.)

III. The Seventh Circuit affirmed, applying *Keller*.

A unanimous Seventh Circuit panel affirmed the district court's judgment. (Pet. App. 1–13.) The court held that Petitioner's "claim is squarely foreclosed by the Supreme Court's decision in *Keller*, which held that the compelled association required by an integrated bar is 'justified by the State's interest in regulating the legal profession and improving the quality of legal services.'" (Pet. App. 10 (quoting *Keller*, 496 U.S. at 13).) "*Keller* further held that an integrated state bar 'may . . . constitutionally fund activities germane to those goals out of the mandatory dues of all members." (Pet. App. 10 (quoting *Keller*, 496 U.S. at 14).)

The Seventh Circuit explained that "[t]he Wisconsin Supreme Court follows *Keller* precisely" and specifically referenced SCR 10.03(5)(b)1 and 2. (Pet. App. 10–11.) The court also explained that Petitioner "has not raised a *Keller* 'germaneness' challenge to any specific State Bar activity funded through compulsory dues" and has not "challenged the adequacy of the dues-deduction procedures or raised a free-standing compelled association claim

distinct from his compelled speech claim challenging the compulsory dues." (Pet. App. 11 n.1.)

The Seventh Circuit then addressed and rejected Petitioner's argument that *Keller* has been "fatally undermined by more recent Supreme Court cases, culminating with *Janus*." (Pet. App. 11.) The court explained that "[t]he tension between *Janus* and *Keller* is hard to miss" and that "*Keller* rests largely on *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–36 (1977), which rejected a First Amendment challenge to a law requiring public employees to pay mandatory union dues." (Pet. App. 11.) The court explained that this Court overruled *Abood* in *Janus* because *Abood* "'was poorly reasoned,' had 'led to practical problems and abuse,' and was 'inconsistent with other First Amendment cases and ha[d] been undermined by more recent decisions.'" (Pet. App. 11 (quoting *Janus*, 138 S. Ct. at 2460).)

Regarding *Keller*'s status as good law, the Seventh Circuit explained that "[w]ith *Abood* overruled, the foundations of *Keller* have been shaken." (Pet. App. 11.) Nonetheless, the Seventh Circuit held that it is solely this Court's "role to decide whether [*Keller*] remains good law." (Pet. App. 11–12.)

The Seventh Circuit explained that it had previously "declined an invitation to find that *Janus* implicitly overruled *Keller*" in an unpublished summary disposition in *Jarchow v. State Bar of Wis*, No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019) ("*Jarchow I*"). (Pet. App. 12.) The Fifth, Sixth,

Ninth, and Tenth Circuits "reached the same conclusion in published opinions." (Pet. App. 12 (listing cases).) And this Court "denied certiorari in *Jarchow*, with two justices dissenting." (Pet. App. 12 (citing *Jarchow v. State Bar of Wis.*, 140 S. Ct. 1720, 1721 (2020) ("*Jarchow II*") (Thomas. J., joined by Gorsuch, J., dissenting from the denial of certiorari)).) The Seventh Circuit also highlighted that this Court "turned away several additional opportunities to revisit *Keller* based on *Janus*" in cases from the Fifth and Ninth Circuits. (Pet. App. 13.) The Seventh Circuit held that "*Keller* therefore remains binding on us" and affirmed the district court's judgment. (Pet. App. 13.)

Petitioner did not seek panel or en banc rehearing.

REASONS FOR DENYING THE PETITION

The question presented does not warrant review for three reasons.

First, there is no circuit conflict or other compelling reason to grant certiorari. This Court has repeatedly denied certiorari in cases just like this one, and it should do the same now.

Second, this Court should not overrule *Keller*. *Keller* remains good law after *Janus*, and the justifications for mandatory bar associations are still sound.

Third, this case is a poor vehicle to revisit *Keller*. The record below was not developed because the

district court resolved this case on motions to dismiss. The Seventh Circuit flatly applied *Keller*, nothing more. If this Court wants to revisit *Keller*, it would be better served by doing so on a fulsome record after further percolation in the lower courts.

I. There is no circuit conflict or other compelling reason to grant certiorari, which this Court has repeatedly denied in similar cases.

First, this Court should deny certiorari because there is no circuit conflict or other compelling reason to grant review. Sup. Ct. R. 10(a)–(c).

Every court of appeals to address the issue of mandatory bar membership since this Court denied certiorari in *Jarchow I* has affirmed the ongoing validity of *Keller*. The Fifth, Sixth, Seventh, Ninth, and Tenth Circuits are all in accord on this issue; there is no circuit conflict about *Keller*'s validity. *See Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748, 755 (5th Cir. 2021); *McDonald v. Longley*, 4 F.4th 229, 243–45 (5th Cir. 2021); *Taylor v. Buchanan*, 4 F.4th 406, 408–10 (6th Cir. 2021); (Pet. App. 10–13 (Seventh Circuit's decision here)); *Jarchow I*, 2019 WL 8953257 (order summarily affirming); *Crowe v. Or. State Bar*, 989 F.3d 714, 724–27 (9th Cir. 2021); *Schell v. The Chief Justice & Justices of the Okla. Sup. Ct.*, 11 F.4th 1178, 1189–91 (10th Cir 2021). *See* Sup. Ct. R. 10(a).

Some lower courts have distinguished between free speech and association claims in addressing

Keller's applicability. *See Boudreaux*, 3 F.4th at 756; *McDonald*, 4 F.4th at 245–46; *Crowe*, 989 F.3d at 727–29; *Schell*, 11 F.4th at 1194–95. But as the Seventh Circuit panel explained here, Petitioner has not "raised a free-standing compelled association claim distinct from his compelled speech claim." (Pet. App. 11 n.1.) Thus, he has not positioned his case to home in on the free-association issue and whether *Keller* left that issue open for further development.

Likely recognizing the consistent positions that lower courts have taken regarding *Keller*, this Court has time and again denied certiorari in cases just like this one. *Taylor v. Heath*, 142 S. Ct. 1441 (2022); *Firth v. McDonald*, 142 S. Ct. 1442 (2022); *McDonald v. Firth*, 142 S. Ct. 1442 (2022); *Schell v. Darby*, 142 S. Ct. 1440 (2022); *Gruber v. Or. State Bar*, 142 S. Ct. 78 (2021); *Crowe v. Or. State Bar*, 142 S. Ct. 79 (2021); *Jarchow II*, 140 S. Ct. 1720.

Nothing has changed. There is nothing outstanding or even different about this case; it is like all the others that were denied review. Neither Petitioner nor amici have demonstrated why this case presents a unique, compelling reason for certiorari.

II. This Court should not overrule *Keller*, which remains good law after *Janus*.

Second, this Court should not overrule *Keller*, which remains good law after *Janus*. *Janus*'s ostensibly undermining *Keller* is the thrust of Petitioner's pitch to this Court to grant certiorari. (*See*

Pet. ii, 2–5, 16, 19–21, 32.) But *Janus* did not undermine *Keller* whatsoever.

In *Keller*, this Court unanimously upheld California's "integrated bar," described as "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." 496 U.S. at 5. Members of the State Bar of California sued the Bar claiming that "use of their membership dues to finance certain ideological or political activities to which they were opposed violated their rights under the First Amendment." *Id.* at 4. This Court upheld mandatory bar membership and dues under the First Amendment but circumscribed what Bar activities may be financed by dues. *Id.* at 4, 14–15.

Specifically, this Court held that "lawyers admitted to practice in the State [of California] may be required to join and pay dues to the State Bar." *Id.* at 4. "[T]he compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 14. The Bar "may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members." *Id.* "It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* "[T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.*

(quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)).

Keller built upon this Court's decision upholding Wisconsin's integrated bar in *Lathrop*. Writing for a plurality of four, Justice Brennan concluded that Wisconsin's integrated bar did not infringe upon First Amendment association rights. *Lathrop*, 367 U.S. at 842–44. The plurality held that the State Bar served the legitimate ends of "elevating the educational and ethical standards of the Bar" and "improving the quality of the legal service available to the people of the State." *Id.* at 843. The fact that the State Bar "engages in some legislative activity" and collects mandatory dues did not, on its face, violate the First Amendment right of association. *Id.* The plurality declined to address the First Amendment free-speech claim presented, which was resolved in *Keller*. *See id.* at 844–48; *Keller*, 496 U.S. at 14–15.

Janus is not on point and did not undermine *Keller*. In *Janus*, this Court considered whether requiring nonconsenting nonmembers of public-sector unions to pay an "agency fee"—a percentage of full union dues—violates the First Amendment. 138 S. Ct. at 2460. Nonmembers had to pay the fee even if they "strongly object to the positions the union takes in collective bargaining and related activities." *Id.* This Court concluded that "[t]his arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id.*

This Court overruled *Abood*'s rule that nonmembers of a public-sector union could be "charged for the portion of union dues attributable to activities that are 'germane to [the union's] duties as collective-bargaining representative,' but nonmembers may not be required to fund the union's political and ideological projects." *Id.* at 2460–61 (alteration in original) (quoting *Abood*, 431 U.S. at 235). *Abood* was "inconsistent with other First Amendment cases and has been undermined by more recent decisions." *Id.* at 2460.

In contrast, *Keller* addressed bar associations, not labor unions. *See Keller*, 496 U.S. at 9–17. And the *Janus* Court did not address *Keller* whatsoever, much less overrule it. *Janus*, 138 S. Ct. at 2459–86. To the contrary, Justice Kagan's dissent noted that this Court has relied upon *Abood* "when deciding cases involving compelled speech subsidies outside the labor sphere—*cases today's decision does not question*. *See*, *e.g., Keller v. State Bar of Cal.*, 496 U.S. 1, 9–17, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990) (state bar fees)." *Id.* at 2498 (Kagan, J. dissenting) (emphasis added). Justice Kagan noted that this Court has "blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression) . . . See *Keller v. State Bar of Cal.*, 496 U.S. 1, 14, 110 S. Ct. 2228, 110 L.Ed.2d 1 (1990)." *Id.* at 2495 n.3 (Kagan, J., dissenting). The *Janus* Court did not respond to Justice Kagan's references to *Keller*, yet it responded to many of her

other points. *See id.* at 2465, 2467 n.4, 2476, 2477 n.23, 2481 n.25, 2482 n.26, 2485 n.27, 2486 n.28.

That *Keller* remains good law is also confirmed by *Harris v. Quinn*, 573 U.S. 616 (2014), a predecessor to *Janus*. The *Harris* Court refused to extend *Abood* to cover union agency fees paid by certain "personal assistants" who provide homecare services to Illinois Medicaid recipients. *See id.* at 620, 645–46. Refusing to extend *Abood* to cover those public employees did not "call into question" *Keller*. *Id.* at 655. "[*Keller*] fits comfortably within the framework applied in [*Harris*]." *Id.* The Court distinguished *Keller* from its public-sector agency-fee cases based on the "State's interest in regulating the legal profession and improving the quality of legal services" and "allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices." *Id.* at 655–56 (citation omitted). Justice Kagan's dissent in *Harris* notes that the Court "reaffirm[ed] as good law" several decisions, including *Keller*. *Id.* at 670 (Kagan, J., dissenting).

Harris also reiterated *Keller*'s holding that there are two sufficient state interests for a mandatory bar:

> [The *Keller* decision] fits comfortably within the framework applied in the present case. Licensed attorneys are subject to detailed ethics rules, and the bar rule requiring the payment of dues was part of this regulatory scheme. The portion of the rule that we upheld served the "State's interest in regulating the legal profession and improving the

> quality of legal services." *Ibid.* States also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices. Thus, our decision in this case is wholly consistent with our holding in *Keller*.

573 U.S. at 655–56. Thus, instead of narrowing *Keller*, the *Harris* Court reaffirmed the two legally sufficient bases for a mandatory bar: regulating the legal profession and improving the quality of legal services.

III. This case is a poor vehicle to revisit *Keller*.

Lastly, if this Court would like to revisit *Keller*, this case is a poor vehicle. Its motion-to-dismiss posture made for a bare record, and a case like this—seeking to overturn longstanding precedent—would benefit from percolation in the lower courts.

First, the case comes to this Court on two granted dismissal motions that were based upon *Keller*'s automatically foreclosing Petitioner's First Amendment claim. (Pet. App. 14, 22, 28.) Because of this limited posture, there is no developed record with evidence about the nuances of Wisconsin's mandatory bar scheme. No evidence was filed.

Second, because there is not a developed record, this case is an inadequate vehicle to suss out differences between Wisconsin's integrated bar and mandatory bar associations in other states. Any nuance would be lost. And if this Court was not inclined to grant certiorari in cases that arrived in a

summary-judgment posture, it should decline review of this case, too.

This case is a poor vehicle with a limited record, and the Court should deny certiorari.

CONCLUSION

This Court should deny the certiorari petition.

Respectfully submitted,

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